(3D)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 587, 588, 589.

EDWIN J. CREEL
Petitioner

vs.

ROBERT T. CREEL
Respondent

PETITION OF EDWIN J. CREEL, FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. FOR REVIEW OF DECISIONS OF THAT COURT DISMISSING APPEALS NOS. 8,770 AND 8,823 AND AFFIRMING IN NO. 8,910.

EDWIN J. CREEL,
in proper person.

INDEX

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PETITION FOR WRITS OF CERTIORARI FOR REVIEW OF DECISIONS DISMISSING APPEALS NOS. 8,770 AND 8,823 AND AFFIRMING IN NO. 8,910.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edwin J. Creel, prays that three writs of Certiorari issue to the United States Court of Appeals for the District of Columbia, to review various portions of a judgment entered in the above entitled cause on May 21, 1944; and which said portions of said judgment decreed dismissal of petitioner's Appeals No. 8,770 and No. 8,823, and which further entered an affirmance in No. 8,910.

Jurisdiction.

The judgment complained of (R. 913) was entered as to all three appeals on May 21, 1945. A timely motion for rehearing was filed on June 5th (R. 914). Motion for rehearing denied June 6th, (R. 922).

On September 5th, petitioner was granted an extension of time to October 6th for filing petitions for certiorari, (R. 929). On October 5th petitioner was granted a further extension of time to November 5th, for filing petitions for certiorari, (R. 929).

Jurisdiction rests on Sec. 240 (a) of the Judicial Code as amended by Act of February 13, 1925.

Statute Involved.

Sec. 101, Title 17, of the District of Columbia Code, 1940; is of special importance as to the two dismissed appeals Nos. 8,770 and 8,823; because of the unusual jurisdiction, that is given the United States Court of Appeals for the District of Columbia, as to appeals from interlocutory orders.

The relevant portions of that Section are as follows:

> "*Any party aggrieved by any final order, judgment, or decree* of the District Court of the United States for the District of Columbia, or any Justice thereof, may appeal therefrom to the said Court of Appeals.
>
> *Appeals shall also be allowed* to said Court of Appeals *from all interlocutory orders* of the District Court * * * *whereby the possession of property is changed or affected,* such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like." (Italics added.)

Federal Rule Involved.

Rule 54-b. Federal Rules of Civil Procedure.

"Judgment at various stages. *When more than one claim for relief is presented in an action,* the court at any stage, *upon a determination of the issues material to a particular claim, and all counterclaims arising out of the transaction* or occurence which is the subject matter of the claim, *may enter a judgment disposing of such claim.*

The judgment shall terminate the action with respect to the claim so disposed of, and the action shall proceed as to the remaining claim."

Brief History of the Litigation.

The three present appeals have originated in the partnership dissolution, receivership, and accounting case of *Creel v. Creel,* Equity 55,407, in the District Court of the United States for the District of Columbia.

The Bill of Complaint (R. 2) was filed by Respondent, on Feb. 28, 1933. A receiver was appointed on March 31, 1933. The appointment of the receiver was affirmed on Appeal, June 25, 1934; 63 App. D. C. 384; 73F. 2nd, 107. Petition for Certiorari was denied by the Supreme Court; 294 U. S. 723.

No other appellate decisions on the merits, have been rendered in the case, excepting only the decision on the present three appeals. This is reported in 149 F. 2nd 830, and is also printed in the record, (R. 913).

The Partnership Business

The partnership business involved is that of Creel Bros., a comparatively large auto-parts jobbing and electric service business of 1811 14th St. N. W., Washington, D. C.

The business assets had an appraised value on Feb. 1st, 1944, of approximately $222,000, exclusive of some $79,000, in the bank balance of the firm as of that date (R. 368). And since the firm had raised its balance to $140,000 on Jan 15, 1944, with bills paid (R. 902) it can be estimated that the business is earning approximately $70,000 per year.

It can also be fairly estimated, that the firm now has a net worth in excess of $450,000; and also that the firm now has over $200,000 in its bank balance.

The Partners Interests

The partnership business was founded by petitioner in 1919. A few months later, Respondent, petitioner's younger brother, was taken into the partnership on a 40% basis. A little later petitioner gave him an additional 10% interest. Since that time each partner has owned a ½ interest; except that through an allegedly corrupt finding of the Auditor, (R. 284), Respondent was given credit for an alleged excess capital contribution of $4,933.60. (R. 174.)

Contributions of the Partners

As a preliminary indication of the character of this receivership — and as an introduction to the statement of the alleged fraudulent abuse of this receivership, and as next set out — it may be stated that petitioner, as the senior and managing partner, contributed to this partnership, a one-half interest in a predecessor partnership—and which interest had an estimated value of $3,000. Petitioner also contributed a further $300 in cash. Thus, a total of $3,300 was contributed, by petitioner, to the original capital of the partnership. (R. 560-562).

Also, in 1925 — after the firm's building had been purchased at a cost of $130,000 — a principal agency of the partnership was lost; and the firm was then faced with a threat of immediate bankruptcy.

Petitioner then, however, sold his compressor invention, (R. 568) and received therefrom $25,000 in cash. That amount was then advanced to the partnership by Petitioner in the year 1925 and 1926; and the partnership was thereby kept from almost certain bankruptcy. (R. 19).

This made a total of $28,300 of advance and capital contributions, that Petitioner had made to the partnership.

Respondent, on the other hand, contributed a total of $1,200 to the capital only. (R. 561, par. 6).

Nevertheless, through an allegedly corrupt finding of the Auditor, (R. 284) — and as stated— Respondent was given credit for an alleged excess capital contribution of $4,933.69.

SUMMARY STATEMENT AS TO THE REVIEW SOUGHT, UNDER THE SUPERVISORY POWERS OF THE COURT, FOR CORRECTION OF AN ALLEGED CRIMINAL ABUSE OF RECEIVERSHIP IN THE CASE.

Certiorari is sought in this cause, under two general phases of this Court's jurisdiction.

That is: Certiorari is sought — on the one hand — under the general supervisory powers of the Court; for general review and correction of an alleged criminal abuse of receivership, that has been carried on against this Petitioner, in this suit, for more than 12½ years past.

This more general conspiracy had, for its original object, the seizure of control, of a valuable partnership business, through abuse of this receivership; and with the primary aim, that the control of the partnership business, would thus be turned over to Respondent, as manager under the receiver, that he himself had been appointed more than 12½ years ago.

A second aim of the said conspiracy was, that by that means, it was proposed to have petitioner's income shut off, through

the seizure of all of Petitioner's property; and so that thereby, Petitioner would ultimately be compelled to sacrifice his interests in the partnership, to Respondent, the plaintiff partner.

And this fraudulent scheme — in its more general aspects — has been carried on against Petitioner, and under this receivership, for more than 12½ years past.

Respondent's Seizure of Control of the Partnership Business

In pursuance of this fraudulent scheme Respondent first alienated and secured control of one of the vital agencies of the partnership. Counsel for Respondent, then made coercive demands on Petitioner for the sacrifice of Petitioner's interests in the partnership — and under threat of receivership if refused.

And on refusal by petitioner of these said blackmail demands; Respondent then in 1933 had the business thrown into receivership, and on what now stands admitted on the record as a perjured Bill of Complaint. (R. 402).

Thus in March, 1933, all of this Petitioner's property, to an estimated amount of at least $100,000; was seized through the receivership, and the entire property was then turned over to the control of Respondent, the plaintiff partner, as manager under the receiver. (R. 227).

By that fraudulent but successful means; Respondent has not only ousted petitioner from any share or interest in the control of the partnership business; but further, plaintiff has thereby secured for himself, a salary of $100 a week; and so that the Respondent has by now been illegally paid more than $65,000 of the firm's funds, as a so-called salary from the receiver. (R. 224, R. 251).

Meanwhile, during the first 10½ years of the receivership; Petitioner's income was almost completely shut off; and so that — while the business is estimated to have earned more than

$300,000 during the period — and while Respondent was being paid more than $50,000, as aforesaid — Petitioner was given a total allowance from his property, during that same 10½ years, of only $4,130. (R. 224).

But, after more than 10 years of that attempt to blackmail this petitioner, into a surrender of Petitioner's interests in the partnership, to Respondent; it seemingly became apparent to Counsel for Respondent, that Petitioner could not be coerced in that fashion.

The Supposed Fraudulent Sale of the Property

Early in 1942, after nearly 10 years of that blackmail attempt, a change was apparently made in Respondent's plan. For a scheme was then undertaken to have the partnership business sold at auction sale (R. 201), but under conditions which, superficially, would appear to be a fair public sale; but where — instead — the conditions were so arranged that, supposedly, no one other than Respondent could actually become the purchaser.

That is, it was obvious that no outsider would care to bid on the property — unless the business were being sold at an enormous sacrifice — because the business is of a highly technical agency character; and if its agencies are lost, the business would be ruined.

And since Respondent has been in practically complete control of the business, for the past 12½ years, as manager, under the Receiver; he has had unlimited opportunity to alienate, and secure practical control for himself, of the vital agencies of the firm.

And if, therefore, any outsider should have ventured to purchase the property; Respondent could then have taken away the agencies, and the trained personnel, and have started up an opposition business; and could thus have left a mere wreck of the business, that had been sold to the purchaser. (R. 275.)

Respondent's Draft of the Order for Sale

In pursuance of the above mentioned scheme to have the partnership business sold to Respondent at a fictitious public sale; Respondent, on March 13, 1942 (R. 200-21) filed a motion for an Order for sale of the partnership property. With that motion, Respondent filed a draft of the proposed order for sale; and that draft was later adopted by the Court (R. 231) on Aug. 31, 1942. The only change made was as to a correction of the amount of the mortgage outstanding on the property.

Summary of Provisions of the Order for Sale

As a means of attempting to carry through the aforesaid fraudulent sale; Respondent inserted various provisions in the draft of the proposed Order for sale. These were as follows:

(1) That either partner could bid and become the purchaser at the public auction sale;

(2) That if either partner became the purchaser, he should be entitled

(a) *at the final settlement and payment of the purchase price*

(b) *to use and apply toward the payment of such purchase price*

(c) such amounts as the receiver might fairly estimate to be the said partner's distributive interest in the assets.

(3) That upon final settlement of the sale, each of the partners was required to execute a conveyance of the partnership property to the purchaser.

(4) The order for sale further provided, (R. 232) that all the assets of the partnership, merchandise, equipment, Real estate, good will, and accounts receivable, and all

other personal property of the said co-partnership "(excepting cash on hand)" were to be sold as an entirety at the said public auction.

Fraudulent Character of the Said Provisions

An examination of the provisions of that order for sale, shows that it was deliberately contrived, to accomplish — what was supposed to be — practically an outright theft of the partnership business, for Respondent.

The Provision That Either Partner Could Purchase

As a means of attempting to carry through the aforesaid fraudulent sale; Respondent provided in the above said order (R. 233) that at the proposed auction, either of the partners could bid and become the purchaser.

This provision is of course in flat contradiction to the inflexible rule laid down by this Court — and every other Court of which this Petitioner has knowledge — and also by the Uniform Partnership Act as enacted in 16 states, and in Alaska — that a partner stands in a fiduciary relation to the partnership, and to his co-partner; and that as such he must account to the partnership for any gains made by him, in any transaction connected with the formation, conduct, or *liquidation* of the partnership. *Kimberly v. Arms,* 129 U. S. 512, 528; 32 L. Ed. 764, 770.

It is further provided by the Uniform Partnership act, in effect in the said sixteen states — and also by principles followed by this Court—that dissolution does not terminate the partnership. Instead, dissolution merely changes it from a continuing partnership, to a partnership for the purpose of winding up the partnership affairs. *Sutherland v. May,* 271 U. S. 272.

It thus follows, that any purchase of partnership property, without consent of his co-partner — and either before or after dissolution — is held to be fraudulent per se, and must be set aside on the mere request of his said co-partner.

And so inflexible is the rule; that no inquiry as to the fairness of any transaction so entered into by such a fiduciary, is even permitted to be raised. *Arnold v. Carter;* 217 U. S. 286.

Counsel for Respondent, however claims he can evade this rigid bar against any such dealings by a fiduciary, by the mere expedient of having the Court pass an order giving Respondent the right to purchase.

The Apparent Futility of Any Sale to Respondent

This fiduciary bar does not hold against a purchase of the business by Petitioner; for Respondent has given his specific consent to such purchase by Petitioner. (R. 290). And even before that specific consent; Respondent must seemingly be held to have given his consent to such purchase by petitioner, because Respondent forced through the provision, in the order for sale —and over Petitioner's protest—that either partner could bid on and become the purchaser of the property.

That fiduciary bar does hold against Respondent however; for Petitioner has never given his consent to a purchase of the business by Respondent. And thus, even though the sale to Respondent should be carried through; it would be a mere futility, for it would have to be set aside, as fraudulent per se, on the mere motion or request by this Petitioner.

It is further to be noted, that Respondent makes the claim, that the charges of fraud made against Respondent by Petitioner, have never been proved. But the very attempt that Respondent is making, to purchase the business for himself, is stamped by the law, as fraudulent per se.

The false claim that Petitioner proposed bidding by the partners.

Although Counsel for Respondent did not openly make the claim in his motions to dismiss the two appeals, in this case; that Petitioner had proposed, that the partners should be permitted to

bid against each other, at a public sale of the partnership property; Respondent does make that false claim by inference.

For in his memorandum (R. 244), in opposition to petitioner's motion for rehearing, as to the grant of that said order for sale; Respondent quotes an excerpt, from a hearing in the District Court, *to apparently show that petitioner had suggested such competitive bidding.*

The facts were instead, that Petitioner claimed that by reason of the purchase of the firm's building, on a 14 year contract; the partnership was not terminable at will, but was—instead—a partnership for a 14 year term; and that term extended until 1938. (R. 324, Par. 54-58).

Petitioner contended that Respondent had wrongfully broken that non-terminable contract; and that therefore, under provisions of the Uniform Partnership Act, petitioner — as the non-wrong-doing partner — should be entitled to take over, and continue the partnership business. And although this provision has never been passed on by any Federal Court; *Petitioner asked that it be applied in this case.*

But that right of Petitioner, as the non-wrong-doing partner, to take over the partnership business—even had it been recognized—would have expired in any case in 1938. Furthermore, even had that right existed, it could not have been claimed by Respondent, for Respondent denied that the partnership was a partnership for a fixed term; and thus that ground for purchase by himself, would not have been open to Respondent, even prior to 1938.

Respondent's Further Claim That a Partner Can Purchase at a Public Auction; and His Falsification of the Rule of Cresse vs. Loper.

As set out in his memorandum (R. 244) in opposition to Petitioner's motion for rehearing, as to the Order for sale; Respondent claims he is not debarred from purchasing the partner-

ship property, if the sale is at public auction; and and if both partners are given an opportunity to bid on the property.

As justification for that claim, he cites the case of *Cresse v. Loper,* 72 N. J. Equity 784; 65 Atl. 1001. Counsel for Respondent cites that case as having ruled that a sale to a plaintiff partner, at public auction, would be set aside, and a resale ordered; where the sale was made *while the defendant partner was confined in an insane asylum;* and where the guardian of the defendant had been misled by the plaintiff. Counsel further says, that the rationale of *Cresse v. Loper* does not therefore apply in this case.

This however is a complete falsification of the New Jersey law. For the facts are, instead, that the Uniform Partnership Act is in effect in New Jersey. A partner is therefore forbidden to purchase partnership property on his own account, and without consent of his co-partner, under any conditions.

And what *Cresse v. Loper* really held was, that it had long been the law in New Jersey; that anyone standing in a fiduciary relation could not become the purchaser of the trust property; and that the circumstances of the *Cresse v. Loper* case, showed the wisdom of that rule.

The Fraudulent Provision for an "Estimate" by the Receiver

The provision No. 2, of the said order of sale, as set out above, was likewise intended, and has been used for a fraudulent purpose. That provision is: that if either partner became the purchaser; he was to be given credit, *on the final settlement and payment of the purchase price,* for whatever amount the receiver might "fairly estimate" to be the said partner's distributive interest in the assets.

It will be noted that the credit to be allowed to the purchasing partner, is not merely a temporary credit; but is instead, a credit which is to be used as part payment, *in the final settlement and*

payment of the purchase price. And the Receiver was then authorized to deed over the property finally, to the said purchaser, *without any further reference to the Court.*

This provision might be entirely legal, if the Court, as in the California case of *Owen v. Cohen;* 119 Pac. (2) 713; had first decided precisely the manner, in which the said credit was to be computed by the Receiver.

The sinister character of that provision, however, becomes apparent when it is seen that under it; it was proposed that the Receiver was supposed to hold—after Respondent had purchased the business—that in purchasing the partnership business, Respondent had actually purchased also, the $79,000 bank balance of the partnership.

For, had Respondent purchased the business at the original sale of Feb. 1st, 1944; and under the said "Order for sale", he would have purchased all of the assets of the partnership except "cash on hand". And, as is shown by the Receiver's own financial statement for the firm, on page 176 of the Record; the term "Cash on hand" has been continuously used in the firm, it is in general banking practice, to distinguish the money that is in one's own possession, from the funds that may be available from a bank balance.

GENERAL OUTLINE OF REVIEW SOUGHT UNDER THE APPELLATE POWERS OF THE COURT

As previously stated; certiorari is sought in this cause, under two general phases of the court's jurisdiction; that is—on the one hand, and—as set out in the preceding section—review is sought under the general supervisory powers of the Court for correction of an alleged abuse of receivership in this case.

Review is also sought under the Appellate powers of the court; for reversal of the action of the Court of Appeals in this cause; and thus for correction and reversal of three successive

and allegedly fraudulent orders, that were issued by the District Court in this case.

The Basic Issue in the Litigation

The basic issue in the litigation itself, is as to which of the two partners, the partnership business shall be awarded to; under two successive sales by the District Court.

That is, whether the Order for Resale, (R. 339) of March 22nd, 1944—and as appealed from by appeal No. 8,770, (R. 340)—shall be reversed; and the partnership business be then ordered turned over to this petitioner—as of the date of sale, Feb. 1, 1944, (R. 264), and at the bid price of $240,500; and under the terms of the original Order for Sale, (R. 234).

Or whether—as an alternative—the order appealed from in appeal No. 8,910 shall be affirmed; and this being an affirmance of the Order finally confirming sale of the partnership business to Respondent, (R. 524), and as of the sales date of May 1st, 1944.

A Controlling Question as to All Three Appeals

A controlling question as to all three appeals—though not the sole one—arises in connection with the principal appeal, No. 8,770.

That question is: Whether a confirmed purchaser at a judicial sale, has a right of appeal from an order for resale; where the said order for resale was entered against the said confirmed purchaser; in the course of a summary proceeding by the District Court, against the said purchaser as an alleged defaulter; and where the said order for resale, holds the said purchaser in default, and orders the "assets purchased" to be resold, at the said purchaser's risk and cost.

And although this precise question has not been passed on—apparently—by this Court; it is petitioner's contention, that that question has been settled by the holding in *Kneeland v. American Loan and Trust Co.*, 136 U. S. 89, 34 L. Ed. 379.

For under this broader rule this Court held that a purchaser or bidder at a judicial sale, has a right of appeal against any subsequent order which adversely affects his rights; and where the terms of said order are not foreclosed to the said purchaser or bidder, by the terms of the order for sale.

Petitioner contends further, that *this same result is arrived at under the widely recognized rule of Forgay v. Conrad,* 6 How. (16 U. S.) 653, 12 L. Ed. 379, 404; and which is that a party to a suit has a right to an appeal from an interlocutory order, that is immediately executable; and where the said order might cause irreparable injury to the party affected adversely thereby.

It is petitioner's contention therefore that either of the above quoted authorities is actually conclusive, as to all three appeals involved in this petition.

Controlling Questions as to Appeal No. 8910.

In similar fashion, there are at least three equally controlling factors, against the validity of the order appealed from in Appeal No. 8910.

One of these factors is, perhaps, of special importance from the standpoint of the grant of a Writ of Certiorari; and that is, that the supposed sale of the partnership business, to Respondent, was not made at the public sale of May 1, 1944. (R. 340.)

Instead, the Court order of May 24th shows that the Court rejected both bids made at the public sale on May 1st; and that the Court then proceeded to sell the partnership business, to Respondent at what was quite obviously a supposed continuation of that public sale of May 1st (R. 340).

And on that basis; the procedure of the District Court, in supposedly selling the business to the Respondent; *comes squarely in conflict with the ruling of the Eighth Circuit,* (1935) in *Bovay v. Townsend,* 78th F. 2d, 343.

For in this last case, *the Eighth Circuit held that the sole power of a District Court, in a public sale, under Section* 847, *is to either*

confirm the sale as made at auction, or to set it aside and to order another.

Invalidity of the Sale to Respondent as a Supposed Public Sale.

A further factor against the validity of the sale to Respondent; is the fact that that said sale was not a valid public sale, under Section 847. For the said sale was not advertised for four weeks as required by Section 849; nor was that sale made on the premises, in accordance with the previous advertising, for the public sale of May 1st.

Invalidity of the Sale to Respondent as a Supposed Private Sale

That sale to Respondent was furthermore, not a valid private sale under Section 847; because no hearing was ever held by the Court, as to such a private sale. No notice was ever given by direction of the Court, that any such hearing was to be held; and the terms of sale were never advertised. That sale to Respondent was thus not a valid private sale.

The Seeming Invalidity of Any Private Sale of Land Under Section 847; Where Such Land Is in the Hands of a Receiver.

But even though the statutory conditions, for a valid private sale to Respondent had been complied with; it appears that any such private sale to Respondent, would still have been invalid; and this for the reason that Section 847, Title 28 U. S. C. (see Appendix "A"), apparently requires, That any interest in land, sold at judicial sale, by a Federal Court, *must be sold at public sale; if the said land is in the hands of a Receiver at the time it is offered for sale.*

This point has apparently never been passed on by this Court. But it appears from rules long established by this Court; that the more general fourth subdivision of Section 847, which permits

of a private sale of land (see Appendix "A"), is overruled by the third more specific subdivision; and which said more specific subdivision requires, that any interest in land sold at a Federal judicial sale, must be sold at public sale, *if it is in the hands of a Receiver when it is offered for sale.*

The Impossibility of Identifying the Assets Supposedly Sold to Respondent.

A further conclusive reason against the validity of the sale to the Respondent; is the fact that it is impossible to identify the assets that were supposedly sold to Respondent.

For the assets supposedly sold to Respondent were those offered for sale at public auction, on May 1st, 1944 (R. 467), under the order for resale of March 22nd, 1944 (R. 339). But the assets offered for sale on May 1st, under the order for resale of March 22nd, were the assets that were sold to petitioner at public sale on February 1st, 1944.

Those said assets were to be sold at Petitioner's risk and cost. Obviously, those assets could not have been sold at Petitioner's risk and cost as of any other date than February 1, 1944—the date of the said sale to Petitioner; and the order for resale of March 22nd states specifically, that the assets to be resold were the assets of Creel Brothers that had been sold by the Receiver at public auction on the first day of February, 1944.

No inventory was taken of the said assets on February 1st. An estimated $130,000 worth of merchandise was sold out of the merchandise stock between the two dates of February 1st and May 1st; and the accounts receivable between the two dates had been reduced from an appraised value of $29,114 to an appraised value of $23,736 (R. 267, R. 497).

But these same assets sold to Petitioner on February 1st were supposedly resold to Respondent, as of May 1st, 1944; and those said asets of February 1st—and of which no inventory was taken —cannot be identified as of May 1st. Thus the sale to Respond-

ent cannot be legally completed, because the assets sold cannot be identified. And since this defect was apparent on the face of the order for sale, that fact would be sufficient to chill any competitive bidding; and thus the said sale to Respondent would legally have to be set aside in any case.

Futility of Any Sale to Respondent

A final reason why the supposed sale to Respondent is illegal and void; is because Respondent stands in a double fiduciary relationship to the partnership; and in that, he is both a partner, and also for the the past 12½ years he has been Manager of the business under the Receiver. And in both capacities Respondent is debarred from any purchase of the partnership property, without the consent of this Petitioner; and that consent, Petitioner has never given.

Furthermore, any such sale to Respondent would be a mere futility. For under rules that have been long established by this honorable Court; any such sale of trust property to a fiduciary, is stamped fraudulent per se; and must be set aside at the mere request of this Petitioner, his co-partner.

The Easy and Equitable Settlement of This 13 Year Receivership by Ordering the Partnership Business Turned Over to Petitioner.

From the foregoing analysis of some of the more crucial issues in the three appeals; it is believed apparent: that if Certiorari is granted, and if the partnership business is ordered turned over to Petitioner—under the terms of the original order for sale—and at the bid price of $240,500—and as of the date of the original sale to Petitioner, Feb. 1, 1944—this 13 year receivership can be brought to a speedy close.

And if on the other hand, Certiorari is denied; the sale to Respondent cannot be legally completed; and any attempt to do so, would mean either that that sale would have to be set aside,

at request of this Petitioner; or, that principles consistently upheld by this Honorable Court, would have to be ignored and forgotten.

SUMMARY STATEMENT OF THE SUBJECT MATTER OF APPEAL No. 8,770

In a preceding section relating to Petitioner's request for review and correction—under the supervisory power of the Court —of an alleged abuse of receivership in this case; Petitioner set out in some detail the antecedents of the Order for Sale, and out of which the present three appeals have originated.

As preliminary to this summary statement, of the subject matter of Appeal No. 8,770; Petitioner will briefly restate the principal events as to the Origin of that said Order for Sale. (R. 231).

Antecedents of the Order of Sale.

On March 13th, 1942, Respondent filed a motion (R. 201) for an Order for Sale of the partnership business.

Respondent's motion was obviously framed in accordance with the requirements of Rule 54-b of the Rules of Civil Procedure. His said motion was therefore based on the claim, that all matters at issue between the partners, had been litigated; and that the interests of the partners, in the assets had been finally determined.

Respondent further, in his said motion (R. 201) made the claim that the interests of the partners, in the assets, having been finally determined; the cause was in a condition for a sale of the partnership business, and a distribution of the proceeds.

It will later be seen, however, that after Petitioner had bought the partnership business at public auction; Respondent then claimed that the issues between the partners had not been thus finally determined; and that $60,000 of receivership costs should be assessed against Petitioner, by the Receiver. It will also be

seen that on that mere assertion by Respondent; the Receiver demanded that Petitioner pay him an additional $60,000 in cash, to cover those said alleged costs; and that when Petitioner refused to meet that illegal demand; the Receiver then had Petitioner declared in default, and the property ordered resold, at Petitioner's risk and cost.

The present Appeal No. 8,770 was taken from that said Order of Resale. (R. 339.)

The Order for Sale.

On August 31st, 1942, the said Order for Sale, (R. 231), was issued by the Court; and in the form that it had been proposed by Respondent, excepting only for a change in the amount of balance due, on the mortgage, on the firm's business property.

Terms of the Order for Sale.

By the terms of that Order for Sale, (R. 231), it was decreed, that all the property of Creel Bros., consisting of the merchandise stock, equipment, real estate, good will, and accounts receivable; and all other property of every kind "(except cash on hand)" should be sold at public auction.

It was further provided that either partner could bid on, and become the purchaser, at said auction sale.

It was further provided, that if either partner became the purchaser, he should be *"entitled at the final settlement and payment of the purchase price, to use and apply toward the payment of such purchase price, such amount as the Receiver may fairly estimate to be his (the partner's) distributive interest in and to the said partnership assets."*

It was further provided that the purchaser should make a deposit of $10,000 at the time of sale; and that final settlement of the purchase must be made within 30 days after confirmation of the sale to the purchaser.

It was further provided, that the Receiver should continue to operate the business, between the date of sale and final settlement of the purchase; and that the Receiver should account to the purchaser for the proceeds of the business, less expenses, during that interim.

It was also provided, that on final settlement of the purchase, both partners were required to execute a deed to the property, to the purchaser.

It was also stipulated, in the Order for Sale, that the interests of the partners in and to the partnership assets had been finally determined by the Auditor's report of January, 1939.

The Sale of the Partnership Business.

The partnership business was put up for sale at public auction on Feb. 1st, 1944. Respondent made the first bid of $160,000. This was raised $500 by Petitioner. Respondent bid another thousand, and Petitioner raised the bid $500 each time.

Respondent dropped out of the bidding at $240,000; and the property was then sold to Petitioner at the bid price of $240,500.

Confirmation of Sale to Petitioner

The sale was confirmed to petitioner, on Feb. 9th, on motion of the Receiver—and with the consent of Respondent. (R. 290.)

Objections of Petitioner to Manner and Time of Confirmation.

Petitioner also asked confirmation of sale. But petitioner objected to the form and manner in which the confirmation was rushed through by the receiver. (R. 268.)

Petitioned objected:

(a) That the Receiver had rushed through the hearing on confirmation, without motion and notice, as required by District Court Rules.

(b) That petitioner was given but four days notice, instead of the five required by rule.

(c) That this short notice, caused the time for settlement, under the thirty day limit, to fall on March 10th, instead of on March 11th.

(d) This meant that the cash received on the day of heaviest cash receipts, March 11th, was thus not available to petitioner to apply on the purchase price. And whereas, had petitioner been given proper notice of five days; the settlement date would have fallen on March 11th; and petitioner would have an additional $10,000 or so, available from the March 11th, receipts.

Still further, had petitioner been given a normal time to consider the form of the order for confirmation, and to permit petitioner to make the motion for that confirmation; and if thereby the time for settlement, had been delayed until after the fifteenth; an additional sum of perhaps $15,000, or a total further sum of perhaps $25,000 cash would have been available, to petitioner, to apply on the purchase price of the property.

And that additional $25,000 cash might have meant the difference between petitioner's being able, or being unable, to complete the purchase within the 30 day time limit set by the order for sale.

(e) Any such attempt to "pinch" petitioner's available funds, was particularly reprehensible, because at the time the Court was holding an estimated $150,000 of petitioner's property; and which property had been seized by the Court, only on Respondent's mere request for the appointment of a receiver.

(f) This whole hurried action was therefore an open attempt on the part of the Receiver to prevent completion of the purchase by petitioner.

Petitioner objected further to the form of the order, and to the manner, of confirmation.

And in this respect, petitioner relied on the holding by this Court in *Pewabic Mining Co. v. Mason,* 145 U. S. 349; 36 L. Ed. 732, where the Court said:

> "The Chancellor will always make such provisions for notice and other conditions (of a judicial sale) as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, *he will certainly, before confirmation, see that no wrong has been accomplished in it by the manner in which it was conducted.*" (Italics added.)

And on this basis, petitioner objected to the manner of confirmation, (R. 2890), both as to the manner in which it had been rushed through; and also to the fact that the District Court—Mr. Justice Goldsborough—refused to include in the order of confirmation, suitable provisions that would have protected petitioner against the fraudulent demands that—in petitioner's opinion—it was obvious that the Receiver would make; and so that thereby, petitioner's right to complete the purchase would be defeated.

The Attempted Intimidation by the Receiver and Respondent

Between February 16th and 28th, 1944, the Receiver and Respondent made numerous attempts to intimidate Petitioner; and to keep Petitioner from completing the purchase of the business; through threats of loss of the firm's agencies, and of the trained personnel of the firm. And the Receiver then further, without consulting Petitioner, gave 90% of the employees of the firm, their releases under the manpower act.

Illegal Demands Made by the Receiver

Between February 16th and March 4th, 1944, the Receiver made various illegal and fraudulent demands—as to the amount payable by petitioner, as balance due on the purchase price; and over and above the credit properly allowable to petitioner, on

account of petitioner's half interest in the partnership property.

Under the order for sale, (R. 231), all assets of the partnership of every kind, including goodwill and accounts receivable, were sold to petitioner at the bid price of $240,500.00; and excepting only "cash on hand."

The usual assets of the partnership are shown in the Receiver's financial statement for the firm, as of April 19, 1938 (R. 176).

As there shown the assets of the firm consist of "cash on hand and in bank," accounts receivable, merchandise, due from manufacturers, notes payable, refunds due on insurance, equipment, prepaid expenses and the business real estate.

And under the order for sale, all of these assets excepting "cash on hand" were sold to petitioner at the bid price of $240,500.00.

The Receiver, however; demanded that petitioner pay him over again for $2,248.00 of miscellaneous assets such as rent, and insurance paid ahead, credits due from manufacturers and the like.

The receiver further deducted $394.02 from the cash that was received subsequent to the sale. He thus deducted that amount from the proceeds belonging to the purchaser.

This made a total of $2,248.00 as aforesaid of assets purchased by petitioner but which the Receiver demanded the petitioner should pay for over again.

These said miscellaneous items, to the amount of $2,248.00, were assets of the firm at the date of the sale February 1, 1944; *they were not "cash on hand" as of that date;* and *they were consequently sold to petitioner in the bid price of* $240,500.00.

The receiver, however, claimed that these charges were adjustments, and that he was entitled to require added payment for them; and this although the Receiver's sole authority in the matter was derived from the order for sale; and there was noth-

ing in the order for sale, which authorized any such adjustments to be made by the Receiver.

Petitioner refused to meet either of those illegal demands, or still others which were also made by the Receiver. That refusal, by petitioner, was then made the basis of the alleged default charged to petitioner, And this fact was used as justification, for the order for resale, which was then entered against petitioner.

The Receiver's Actual Estimate of Petitioner's Distributive Interest

From the second page of the estimate supplied by the Receiver, as to the balance payable by petitioner, on the purchase price (R. 369); it will be seen that the Receiver actually estimated the credit due to petitioner, to be one-half of the total net assets, or $143,706.00; and this would have left a balance due and payable by the petitioner on the property, of $96,894.00. Or if the $2,248.00 of illegal demand by the Receiver had been eliminated this would have left a balance due and payable on the property by petitioner of approximately $94,646.00.

The Further $60,000 Demanded by the Receiver

As stated, the Receiver's own estimate (R. 369) showed the credit allowable to petitioner on the purchase price to be $143,706.00; thus leaving a balance payable by petitioner of $96,894.00.

The Receiver then further demanded, however; that petitioner should pay him an additional $60,000.00 in cash; to cover alleged receivership costs; and which costs, the receiver stated, respondent now claimed should be charged against petitioner.

By this means the Receiver was able to demand (R. 369) that petitioner pay him a total of $158,218.00; but this amount includes the $10,000.00 deposit, made by petitioner, at the time of the sale.

No authority was given the Receiver in the order of sale to make any such demand on respondent. Furthermore, the Re-

ceiver was well aware that respondent was stopped from making any such claim against petitioner, because of the repeated claims by respondent—and which claims he had inserted in the Order for sale itself—that all matters in dispute between the partners had been finally adjudicated; and that it had been finally settled and determined—by the Auditors' report of 1939—that each partner owned one-half interest in the assets but subject to the prior credit to respondent, of $4,933.69 for alleged excess capital contribution.

The order for sale itself (R. 231); made the same repeated assertion that all matters in dispute had been adjudicated between the parties.

Petitioner, therefore, refused to meet this further illegal demand by the Receiver for payment of that added $60,000.00.

The Receiver had thus made illegal demands on petitioner for $2,248 as payment for assets that had been sold to the petitioner, at the original sale; and a further $60,000.00 for alleged Receivership costs. This was a total of $62,248 that was illegally demanded of petitioner by the Receiver.

The Receiver's Falsification of the Terms of the Order for Sale.

It will be observed that under the terms of the order for sale (R. 231) the Reeciver was required to make a fair estimate, of petitioner's distributive interest in the assets; and then to allow petitioner a credit, of that amount in the *final settlement and payment of purchase price.*

Furthermore, that payment in full settlement, by petitioner, was required to be made within thirty days; and the Receiver was then authorized and directed, to deed over the property to petitioner; and without any further reference to the court.

The Receiver, however, misinterpreted that provision as though it had read that he was merely to give a temporary credit to petitioner, on the purchase price; and that the actual amount to

be allowed to petitioner on the purchase price was then to be settled in a later accounting.

The $37,500 Error in the Receiver's Figures.

But even though there had been an authorization to the Receiver, to make any such demand on petitioner—for payment of receivership costs—there would still have been a $37,500 mistake in the receiver's own figures, as to the said Receivership costs.

At the time that the purchase, by petitioner, was due for settlement; that is, March, 1944; the Receiver refused to give any explanation of his demand—for that $60,000—for receivership costs—other than that $40,000 of the amount, was for receivership costs already incurred; while a further $20,000, was for receivership costs that were estimated to be payable in the future.

Two months later, however; that is, on May 5th, 1944; the Receiver sent a letter to petitioner in which he still claimed, (R. 361); that he was not required to give any explanation of his said demands; but that nevertheless, he would do so.

It was then apparent from his further explanation (R. 361) that of the $40,000 of receivership costs already incurred, $5,000 was for costs not yet paid, of the sale to petitioner on February 1st. The remaining $35,000 was for costs of receivership already paid.

It was then further evident, however; that of the $35,000 of costs already paid; $17,500 of that amount, *had been paid out of petitioner's own share of the partnership funds;* and that the receiver had thus demanded, that petitioner pay him over again for $17,500 of costs that had already been paid by petitioner.

It was further apparent; that the Receiver's demand for $20,000.00 for receivership costs estimated to be incurred in the future was likewise without any justification.

For, had petitioner paid the $40,000 illegally demanded by the receiver, petitioner would have taken over the business immediately. The receivership would then have been terminated; since

there would only have been a sum of money in the custody of the court; and there would have thus been no further, or very little receivership costs of any kind.

This was a total error of $37,500 in the Receiver's claim for receivership costs allegedly payable by petitioner.

Petitioner charges therefore that petitioner was not required to meet the illegal demand of the receiver; that petitioner pay either the $2,248.77, for items that had already been purchased by petitioner, in the bid price of $240,500; nor the $17,500 of receivership costs that had previously been paid by petitioner; nor the $20,000 for future receivership costs, of a receivership that would have terminated, had petitioner paid the $40,000 of costs previously paid; nor even the remaining $17,500 which, the receiver said, that Respondent claimed should be assessed against this petitioner.

And since petitioner was not required to meet that illegal demand, that petitioner pay some $62,248.79, over and above the amount, which the receiver's own estimate showed to be the balance due by petitioner; petitioner was not at fault, in his failure to consummate the sale under those conditions.

Refusal of Petitioner to Make a Tender.

By the Receiver's letter of March 4th, (R. 379) in which the Receiver transmitted his estimate (R. 368-369) as to the amount payable as balance due by Petitioner, on the purchase price; it was apparent that the Receiver intended to maintain his position, as to the demands that he had made.

It was evident that the tender of any proper amount by Petitioner—when the Receiver even refused to give petitioner any information as to the basis of his estimate—would be wholly useless. Petitioner therefor made no tender of any kind.

Petitioner's Appeal of March 10th.

The terminal date of the 30 day period for settlement of the purchase price, was at 4 P. M., on March 10th. And since it was

apparent that any tender by petitioner, would be wholly useless; Petitioner, therefore, on the afternoon of March 10th—and before the expiration of the time limit for the final settlement of the purchase—filed his notice of appeal from the Order of Feb. 9th, (R. 283) and by which said order the sale of the partnership business was confirmed to this Petitioner.

The Apparent Stopping of the Running of the Time Limit Against Petitioner.

In *Bronson v. LaCrosse,* 1 Wall. (68 U. S.) 405-411; This Court held that an appeal by a party, from an order in his favor, suspends the execution of the decree—and that no supersedeas was necessary to suspend the execution in such a case.

It is Petitioner's contentions therefore; that by reason of the noting of that appeal (R. 298) by Petitioner on March 10th, 1944, against the Order which confirmed sale of the partnership business, to Petitioner, on Feb. 9th, 1944 (R. 283), that thereby also, the running of the 30 day time limit, against Petitioner, was stopped, as of the afternoon of March 10th, And since this was before the expiration of that said 30 day time limit; Petitioner seemingly could not thereafter be guilty of default. For under the rule of *Bronson v. LaCrosse,* above, it would have been impossible for Petitioner to complete the purchase, after the filing of that said notice of appeal.

One of the issues thus presented by this petition is whether an appeal taken by a party, against an order in his own favor, suspends the running of a time limit against that party, under the said decree.

Transfer of Jurisdiction to the Appellate Court by Petitioner's Appeal of March 10th.

It may be noted, that Counsel for Respondent has never questioned the validity of that appeal by Petitioner on March 10th, 1944, from the Order of Feb. 9th, confirming sale of the partnership business to this Petitioner.

Petitioner has also set out elsewhere herein, the grievances of Petitioner against that said Order.

And since no question has been raised as to the validity of that said appeal, by Petitioner, on March 10th, 1944; Petitioner contends that, by reason of that said appeal; all jurisdiction over the subject matter of that appeal was transferred to the Court of Appeals, as of the afternoon of March 10th, 1944.

Invalidity of the Order for Resale of March 22nd

Despite this seemingly obvious transfer of jurisdiction to the Court of Appeals; the District Court nevertheless proceeded on March 22nd—or just 10 days later—to enter its order of resale against this Petitioner. And thus—as Petitioner believes—that said Order for resale was not only fraudulent in itself; but further, it was absolutely illegal and without any validity.

Nevertheless, it is Petitioner's understanding that until that said Order for resale is reversed by an Appellate Court; it is still binding on the District Court; and this appears to be another question that should be settled in this case, by the grant of a writ of Certiorari.

The Alleged Fraudulent Justification for That Usurpation of Jurisdiction by the District Court.

As grounds for this usurpation of the appellate jurisdiction; the Receiver urged (R. 308), that *"Delay in settlement may result in irreparable loss to and depreciation of the assets and good will."*

Also, on February 9th, 1944, and as a reason why it had been necessary to hurry through the confirmation of the sale to Petitioner, on an illegally short notice; The Receiver said, (R. 294) "Now, if we do not close this sale promptly the whole thing might fall out from under us and I do not want it to fall out from under me while I have it in charge."

Thus, when it was a question of using illegal means to defeat the purchase by Petitioner;! the Receiver and Respondent urged that an immediate sale was necessary to prevent an immediately threatened collapse of the business.

But after the Court had passed its order for resale, and had stripped Petitioner of that right to take over the property; there was no longer any need for hurry.

The business was then put up for resale, and the Order for resale permitted Petitioner to again bid on the property. And when Petitioner did bid on the property, at the resale on May 1st, the Receiver then stopped the sale, and merely reported the bids of Respondent, and of Petitioner to the Court. (R. 340.)

Then despite that earlier alleged threatened ruin, unless the business were sold immediately; the District Court, on May 24th, passed still another order giving Petitioner still another 30 days within which to purchase the partnership business.

And then, after the business had been "sold" by the Receiver to Respondent, on June 26th—and despite that alleged threat of immediate ruin, unless the business were sold immediately—the District Court then gave Petitioner a further three and one-half months, to take over the business, by offering 10% more than the price at which it was to be sold to Respondent.

Under these conditions it is obvious that the danger of immediate collapse, unless the business were sold immediately—and as urged by the Receiver in his report to the Court—was merely an excuse for preventing the completion of the purchase by this Petitioner.

The Order for Resale of March 22nd.

On the Report of the Receiver (R. 305) showing alleged default by Petitioner; the District Court, on March 22nd (R. 336) entered an Order for Resale of the property, (R. 339).

Terms of the Order for Resale.

By the terms of that said Order for Resale, (R. 339) the *assets that had been sold to Petitioner, on Feb. 1st, 1944, were ordered resold at Petitioner's risk and cost.* And also, the $10,000 deposit made by Petitioner at the time of the sale, was ordered returned to Petitioner.

Summary Character of the Proceeding Against Petitioner

It will be observed that the said Order for Resale did not set aside the sale, and then order a new sale of the assets of Creel Bros.

Instead the whole theory of that order for resale, was apparently to leave the sale of the partnership business confirmed to Petitioner; and then to order the said assets resold at Petitioner's risk and cost.

And it is from that said order for resale, that was *entered during the course of that said summary proceeding,* against this Petitioner; that the present Appeal No. 8,770 was taken.

Summary Statement of the Subject Matter of Appeal No. 8,823

After entry of the Order for Resale (R. 339) on March 22nd, 1944; the property was again offered for sale, under that said Order for Resale, on May 1st, 1944.

Seemingly, it had been supposed—up to that time; that Petitioner would be afraid to again bid on the property; and so that the partnership property, could then be resold to Respondent.

However, the order for resale was so framed, by a reference to the original order of sale, as to give petitioner a specific right to bid on the property; and to become the purchaser at the resale.

At the said supposed resale on May 1st, therefore; petitioner again outbid, Respondent. And under those conditions, the

Receiver then stopped the sale, and merely took deposits and the bids of the two parties, to report to the Court (R. 340).

Then in seemingly total disregard of statutory provisions; Mr. Justice Goldsborough, on May 24th entered a so-called "Order on the Receiver's petition for instructions." (R. 466.)

This said Order, of May 24th, provided for neither a public nor a private sale; these being the only two forms allowed by statute. Instead, that order provided that Petitioner should have the right, for 30 days, to purchase the property at $240,500; but provided that the purchase be completed within 30 days. *No one however, was authorized to sell the property to petitioner.*

Since Petitioner had a valid appeal pending in No. 8,770; Petitioner refused to attempt to buy the property under that illegal scheme; although the price was supposed to be the same. Instead, Petitioner preferred to rely on his appeal, No. 8,770; and one reason was, that the assets that were supposed to be sold under that order of May 24th, *could not be identified.*

On June 23rd, therefore; and for the purpose of blocking the obviously intended sale to Respondent; *petitioner filed notice of his second Appeal No.* 8,823, as against the "Order on the Receiver's petition for instructions" of May 24th.

Summary Statement of the Subject Matter of Appeal No. 8,910

The aforesaid Order of May 24th, provided further that if petitioner failed to complete the purchase within 30 days, and which would have been an impossibility—that then Respondent should have the right to buy the property at $240,000; provided that Respondent put up a deposit of $10,000; and provided that he completed the purchase, within a further 30 days.

Immediately after the expiration of the 30 days allowed for purchase by Petitioner; *the Receiver then accepted the offer* of Respondent, to purchase the property; and Respondent paid down the $10,000 deposit. (R. 471-476.)

The Receiver was not authorized to accept the said offer. But, nevertheless, the Receiver reported the matter to the Court; although it would have been impossible for Respondent, under the law, to have completed the purchase within 30 days. (R. 471.)

Furthermore, under the Order of May 24th, under which Respondent "purchased" the property, it was physically impossible to identify the assets, supposedly sold to Respondent. And this error continued all through the further proceedings, and including the final confirmation of the sale to Respondent.

Respondent did not of course complete the purchase, within the 30 days, as required by the order of May 24th.

Instead on Aug. 30, 1944; or more than 30 days later (R. 498), an Order Nisi was entered by the District Court. That Order Nisi confirmed *the acceptance of the said offer,* of Respondent, by the Receiver. That Order Nisi further provided, that the said sale to Respondent, should be finally ratified and confirmed, unless cause to the contrary be shown, or a higher offer acceptable to the Court, be made on or before Oct. 9th.

Again it was petitioner's opinion, that that procedure failed completely to conform to the statutory requirements, for either a public or a private sale. And petitioner again refused to make any counter offer, under that Order Nisi, even though an additional $30,000, or $40,000 of profits, had piled up in the business, since the sale to Petitioner, at the bid price of $240,500, on Feb. 1st.

And this appearance of illegality, as a means of chilling the bidding, would again seem, under repeated rulings by this Court, as an all sufficient bar to the validity of the sale to Respondent.

Furthermore, as before stated, the assets supposedly sold to Respondent cannot be identified. (R. 916, par. 30-31.) Also the terms of such sale, if it was a private sale, were never advertised as required by statute. Instead only a copy of the Order Nisi was published, and it merely states that the terms are all cash, subject to the terms of the order of May 24th, and these terms were not advertised.

Finally, it would seem from various decisions of this Court, that it would be held that the specific provisions of the third "subdivision" of Sec. 847, Title 28, U. S. C.; overrules the more general 4th "subdivision," and which last "subdivision" permits a private sale of land. And if the so-called third "subdivision" does control; then any interest in land, *if it is in the hands of a receiver, must be sold at public sale.* (See Appendix A.)

But however, this may be; the irregularity of the proceedings was so great as to completely "chill" any bidding by this Petitioner, despite the accumulated $30,000 or $40,000 of profits, meanwhile.

For this reason among others; petitioner made no competitive offer, under the terms of the Order Nisi; nor did anyone else.

And so, on October 9th, 1944, the sale of the partnership business was finally confirmed to Respondent by the District Court.

It was from that Order Finally Confirming Sale, that Petitioner's third appeal, No. 8,910 was taken.

INTRODUCTION TO QUESTIONS PRESENTED ON APPEAL No. 8,770

RECAPITULATORY NOTE: On March 22nd, 1944, the District Court entered its "Order for Resale" (R. 309); and which said order for resale: (a) Held petitioner in default; (b) ordered the return of the $10,000 deposit to petitioner; and (c) Directed the resale of the property at petitioner's risk and cost.

Appeal No. 8,770 was taken from that order of resale. It should therefore be observed that the requirements for an appealable order, under the D. C. Code are that petitioner *must have been aggrieved thereby;* and that the said order *must either have been a final order;* or, it must have been *an interlocutory order "whereby the possession of property is changed or affected."*

QUESTIONS PRESENTED ON APPEAL No. 8,770

I. Whether the Court of Appeals erred in dismissing appeal No. 8,770 as having been taken from a non-appealable order.

That is:

I-A. Whether the Court below erred in failing to hold: *that petitioner was aggrieved* by the terms of that order; that is (a) because petitioner was thereby stripped of the right to have a business earning $70,000 a year turned over to him; and (b) because the property was then to be resold at petitioner's risk and cost.

I-B. Whether the Court below erred in failing to hold: that the said order of resale *was appealable as a final order:* (a) Under the rule of *Kneeland v. American Loan,* 136 U. S. 89; 34 L. Ed. 379; that is, that a *purchaser at a judicial sale,* acquires thereby a right of appeal against any subsequent order, that adversely affects his interests; or (b) Under the Rule of *Forgay v. Conrad,* 6 How. 210; 12 L. Ed. 404; that an interlocutory order is final and appealable, *if it is immediately executable;* and *if material injury could be caused* to a party thereby.

I-C. Whether the Court below erred in failing to hold, that the said order of resale was appealable, *as "an interlocutory order whereby the possession of property was changed or affected."* That is:

(a) Whether the order for the return of the $10,000 deposit to petitioner, was not a release of a lien on that $10,000, and so that thus the possession of property was affected?

(b) Whether the return of the $10,000 deposit to petitioner, was not also a change in the possession of property?

(c) Whether that order of resale, which held petitioner in default, did not strip petitioner of a valuable property right; this said right being the right to have a property—earning $70,000 a year—turned over to petitioner, on payment of the purchase price?

II. Whether the Court below erred in failing to hold:

(a) *That the said Order for Resale must be set aside and quashed:* because—by reason of the filing of the appeal by petitioner, on March 10th, (R. 298)—from the order confirming sale of the property to petitioner, (R. 283)—all jurisdiction over the subject matter was transferred to the Court of Appeals; and so that the Order of Resale, as entered by the District Court on March 22nd, was wholly null and void; and

(b) Whether the Court below erred in failing to follow in this respect, the applicable decision of this Court in *Newton v. Consolidated Gas,* 258, U. S. 177; 66 L. Ed. 548.

III. Whether the Court below erred in failing to hold that the said order for resale; must be set aside and reversed, as erroneous; because petitioner was not guilty of blameable default, in refusing to complete the settlement under the terms demanded by the Receiver. That is

III-A. That where petitioner had purchased all the assets of the partnership, except cash on hand, the receiver had no authority to demand that petitioner must pay additionally for miscellaneous credits of the partnership, and such as insurance paid ahead and the like.

III-B. That where the order of sale recites, that all questions as to the rights and interest of the partners, in the assets, had been finally determined; the Receiver was not authorized to require, that petitioner must pay to the Receiver, $60,000 to cover costs of the Receivership; when no such claim against petitioner had been determined by the Court.

III-C. That where $35,000 of Receivership costs had been paid from partnership funds—and of which $17,500 had been paid from petitioner's share of the said fund; the Receiver was not authorized to require that petitioner should pay the Receiver over again for that said $17,500.

IV. Whether the Court below erred in failing to hold and direct: that since the *alleged default was not due to any fault of petitioner;* that *the sale of the partnership business to petitioner must be completed;* and that the property must be turned over to petitioner, as of the original sale date of Feb. 1, 1944; and at petitioner's bid price of $240,500; and under the terms of the original order of sale, as those terms should have been properly interpreted by the Appellate Court.

V. Whether the Court below erred in failing to hold and direct that *Respondent must account to the partnership,* for the more than *$65,000 that has been paid him as a so-called salary by the receiver,* during the 12½ years of this receivership.

VI. Whether the Court below erred in failing to hold and direct that the final terms of settlement, by petitioner, for the partnership property, shall be made subject to a proper accounting between the partners as to parnership affairs.

Reasons Relied on for the Allowance of the Writ as to Appeal No. 8,770

I. That all three appeals in this case are so interlocked; that if certiorari is granted in one case it should be granted in all three.

II. That the Court of Appeals for the District of Columbia has, by its decision in this case, placed itself in conflict with the opposing decisions of the Circuit Court of Appeals, for the 3rd and 7th Circuits.

That is, in this case the United States Court of Appeals for the District of Columbia, has ruled that a bidder, at a judicial sale, has no right of appeal, from a subsequent adverse order affecting the said bidder's interests; and the Court of Appeals in this case has cited *Butterfield v. Usher,* 91 U. S. 246; 28 L. Ed. 218, as its authority.

And whereas to the contrary; the 3rd Circuit Court of Appeals in *Investment Registry v. Chicago* (1913), 212 Fed. 594, 603; held that a bidder at a judicial sale has a right of appeal from any subsequent order, adversely affecting his interests; and that Court further held that the case of *Butterfield v. Usher,* above cited, was inapplicable.

And whereas also; the 3rd Circuit Court of Appeals, in *Smith v. Hill,* 5 Fed. 2nd, 148 (1925) upheld the same rule and cited the case of *Investment Registry v. Chicago,* above cited, as corroborating authority.

III. That by dismissing Appeal No. 8770, as having been taken from a non-appealable order; the United States Court of Appeals for the District of Columbia, has failed to follow applicable decisions of this Court; and in that, in this case, the Court of Appeals has ruled:

A. That a purchaser at a judicial sale has no right of appeal, against a subsequent adverse order affecting his interests, and this is contrary to the applicable ruling of this Court, in *Kneeland v. American Loan and Trust Co.,* 136 U. S. 89; 34 L. Ed. 379.

B. That a party to a suit has no right to appeal from an interlocutory order, which is immediately executable, as in this case; and where it might cause irreparable injury to the party affected adversely thereby; and that holding is directly in conflict with the principle laid down by this Court in *Forgay v. Conrad,* 6 How. 210; 12 L. Ed. 379.

IV. That the said Court of Appeals has in this case followed the obsolete rule of *Butterfield v. Usher,* 91 U. S. 248; 23 L. Ed.

318; that an order setting aside a sale and ordering a resale is not appealable; and this is directly in conflict with the principle enunciated by this Court, in *Kneeland v. American Loan and Trust Co.,* 136 U. S. 89; 34 L. Ed. 379.

V. That this Honorable Court should reverse or clarify its holding in *Butterfield v. Usher,* 91 U. S. 246; 28 L. Ed. 218; For the decision of this Court in the said case of *Butterfield v. Usher,* was clearly based on the old English practice, of reopening the bidding, even after confirmation of a judicial sale, for an advance of 10% in the bid price; and that practice is now no longer countenanced by this Court.

The facts are that in that said case of *Butterfield v. Usher,* the bidding was reopened on an assurance by the defendant of a $500 higher bid; and under the added proviso, that the defendant repay to the purchaser 10% interest on the money the said purchaser had invested.

VI. That if Certiorari be granted, and the business be ordered turned over to this Petitioner; this 12½ year old receivership can be terminated; for the sale to Petitioner was a valid public sale; and Petitioner has the express consent of Respondent to the purchase by Petitioner of the Partnership property.

On the other hand, should Certorari be denied; the sale to Respondent cannot be carried through, because the assets supposedly sold to Respondent cannot be identified; and, further, even though the sale should be actually carried out; it would have to be set aside on demand of this Petitioner; or else, this Court would seemingly be compelled to radically revise the law of Fiduciary Relationships, that it has upheld, since the beginning of the Republic.

Respectfully submitted,

EDWIN J. CREEL.